No. 14,409

(Criminal Action)

In the

United States Court of Appeals

For the Ninth Circuit

CLAUDE E. SPRIGGS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Petition for Rehearing

Appeal from the United States District Court
for the District of Arizona.

CLAUDE E. SPRIGGS
730 West Coronado Road
Phoenix, Arizona

In propria persona

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Texts

Pages

OTHER AUTHORITIES

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To: The Honorable United States Court of Appeals for the Ninth Circuit:

The petition of the defendant-appellant for a rehearing of the appeal herein is based upon the following grounds:

1. The Court erroneously concluded that the dismissal of the prior indictment was not accomplished under Rule 48, Federal Rules of Criminal Procedure.

2. The Court erroneously assumed that a written order granting appellee's plea in bar in part was signed by the trial judge through inadvertence.

3. The Court erroneously concluded that the action of the trial Court upon the trial of the first indictment in striking items (a) and (b) of Count III did not constitute an acquittal as to these items.

4. The Court misapplied the rules and principles announced by this court in *Spriggs v. United States,* 198 Fed. (2) 782.

5. The Court disregarded the rule announced by this Court in *Karn v. United States,* 158 Fed. (2) 568, and Rule 29, Federal Rules of Criminal Procedure.

6. The Court disregarded the rule of res adjudicata.

ARGUMENT

Point I

Rule 48 of the Rules of Criminal Procedure provides that the Attorney General or the United States Attorney may file a dismissal of indictment, information or complaint only by leave of court. The rule further provides upon such dismissal being entered "the prosecution shall thereupon terminate."

This court, in its opinion, has stated that the dismissal of the first indictment which was entered following receipt of the mandate of the Court of Appeals in *Spriggs v. United States,* 198 Fed. (2) 782, was entered as a common law nolle prosequi. The effect of the adoption of Rule 48 was to abolish the common law nolle prosequi. This action could not therefore have constituted a nolle prosequi. Notes of Advisory Committee on Rule 18, U.S.C.A., Rule 48, page 537, *United States v. Doe,* 101 Fed. Supp. 609, American Law Institute Code of Criminal Procedure page 895-897. The fact that appellant Stipulated to such dismissal does not in any way bar him from relying upon the dismissal as a termination of the prosecution. The appellant could only

have stipulated to a dismissal under Rule 48 with all of the attendant effects of such dismissal and certainly did not by such stipulation either expressly or tacitly authorize a re-indictment by another grand jury.

Point II

The trial court, Honorable Claude McCulloch, on February 10, 1954, at the time of denying the plea in bar stated from the bench that he wanted the United States Attorney to understand that notwithstanding his order denying the plea in bar he would not permit the United States Attorney to present evidence to the jury upon the trial of the matter with reference to items (a) and (b) of the Count which were duplications of the same items of Count III of the first indictment but would let him go to trial only upon item (c) which was the over-statement of depreciation on the Henshaw Road property. No reporter was present when these remarks were made by the trial court and for this reason they are not now a part of the record before this court. The affidavit of the appellant concerning this is filed herewith and by reference made a part of this petition. That pursuant to these statements of the Honorable Claude McCulloch, made from the bench on February 10, 1954, the United States prepared and presented the order of February 25, 1954. The order as prepared by the United States Attorney expressed the spirit of the remarks made by the trial judge from the bench on February 10, 1954.

Upon the plea in bar being granted in part and denied in part the Court lost jurisdiction of items (a) and (b) of the bill of particulars and jurisdiction could only be regained by a re-indictment of the Grand Jury. 5th Amendment of the United States Constitution; *ex-Parte Bain* 121, U.S. 1.

The Court in the case of *ex-Parte Bain* stated: "The

declaration of Article V of the Amendment of the Constitution, that no person shall be held to answer—unless on a presentment or indictment of the Grand Jury is *jurisdictional.*"

Point III and Point IV

It is a well established rule of law upon the empaneling of a jury and the taking of any testimony jeopardy attaches and may thereafter be claimed by the defendant; *Hunter v. Wade,* 169 Fed. (2) 973; 335 U.S. 907; *Clawans v. Rives,* 104 Fed. (2) 240; *McCarthy v. Zerbst,* 85 Fed. (2) 640.

The trial judge upon the first trial of the appellant withdrew from consideration of the jury items (a) and (b) of the bill of particulars as to Count III. This procedure has been approved in *Mellor v. United States,* 160 Fed. (2) 757, and *Ballard v. United States,* 152 Fed. (2) 941, 329 United States 187. The pertinent question presented to this court is the effect of such withdrawal. A careful examination of the authorities has been made and appellant has found two cases which hold that withdrawal of items from a jury on the grounds of insufficient evidence constitutes an acquittal of the defendant as to such items and amounts to a direction to the jury of judgment of acquittal. *State v. Lane,* 72 S.E. (2d) 737; *Parish v. State,* 165 S.W. (2d) 748.

The appellant has found no cases announcing a contrary rule.

This court in the first Spriggs appeal stated that the appellant had been acquitted of portions of Count III. We can see no justification of the court now concluding that this court did not mean exactly what it said in the first appeal but in fact this court in the first appeal held that the withholding items (a) and (b) from the jury constituted an acquittal.

Point V

The appellant, as pointed out in the opinion in this case, following his conviction in the first case, filed motions for judgment notwithstanding the verdict and for a new trial. Each of these motions were denied and the first appeal followed. It is appellant's contention that he was entitled to a judgment of acquittal notwithstanding the verdict. This is true even though a new trial was requested, for the reason the evidence was insufficient to support a conviction.

This court, in *Karns v. United States,* 158 Fed. (2) 569, held that the proper procedure on reversal of a case for insufficient evidence was that upon reversal a judgment of acquittal should be entered. It is our position that upon receipt of the mandate from the court in the first appeal, the entry of the order of dismissal by the trial court constituted such an acquittal. This procedure is consistent with the rule announced in the *Karns* case and Rules 29 and 48 of the Rules of Federal Criminal Procedure.

Point VI

The Court in its opinion totally disregarded the rule of res adjudicata although it is a well established rule in criminal procedure. The doctrine and application of res adjudicata and the distinction between double jeopardy and res adjudicata are discussed in an opinion of Justice Douglas in *Sealfon v. United States,* 332 U.S. 575. Also see 147 A.L.R. 992.

In the case of *Partmar Corporation v. Paramount Pictures Theatres Corporation,* 98 L.Ed. 301, wherein Justice Reed, speaking for the United States Supreme Court, affirmed the rule that a prior adjudication conclusively disposes of all matters which were or might have been litigated or adjudged therein.

The courts have held that the rule of res adjudicata applies to every question falling within the purview of the original action in respect to matters of both claim and defense which could have been presented by the exercise of due diligence and the conclusiveness of the judgment in such case extends not only to matters not determined but to other matters which could have been determined in the prior action.

30 Amer. Jur. 923, under judgments, para. 179;
13 Amer. Jur. 45, under criminal law, para. 367;
United States v. Dockery, 49 Fed. Supp. 907;
United States v. Carlisi, 32 Fed. Supp. 479;
United States v. Oppenheimer, 242 U.S. 85;
Stone v. U. S., 167 U.S. 178;
30 Amer. Jur. 907, under judgments, para. 161-165;
167 A.L.R. 991;
United States v. Adams, 281 U.S. 202;
Fall v. United States, 49 Fed. (2) 506.

For the above reasons the defendant-appellant respectfully prays that this court grant a rehearing.

Dated May 6, 1955.

Respectfully submitted,

Claude E. Spriggs
In propria persona

Jack C. Cavness
510 Luhrs Tower
Phoenix, Arizona

Attorney for Appellant

CERTIFICATE OF COUNSEL

The foregoing petition is believed to be well founded in point of law and has not been filed for purposes of delay.

Claude E. Spriggs
In propria persona

Jack C. Cavness
510 Luhrs Tower
Phoenix, Arizona

Attorney for Appellant

Appendix Follows

APPENDIX

In the United States Court of Appeals
For the Ninth Circuit

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Claude E. Spriggs,
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United States of America,
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AFFIDAVIT

State of Arizona
County of Maricopa—ss.

Claude E. Spriggs, being first duly sworn upon his oath deposes and says:

That he was in the Courtroom acting as his own attorney on the 10th day of February, 1954, in the above entitled matter; that on said date a hearing was held in front of the Honorable Claude McCulloch, United States District Judge, wherein hearing was had upon a motion filed by the defendant for a plea in bar. That at that time the Court announced from the bench, directed directly to Robert S. Murlless, Assistant United States Attorney, that the reason he was denying the plea in bar was with the express understanding that no evidence would be introduced upon items (a) or (b) of the bill of particulars of Count III of the indictment.

The Court further stated that he wanted the assistant United States Attorney to understand that upon the trial of the matter that he would be limited to the trial on item

(c) of the bill of particulars on Count III, which was for the over-statement of depreciation on the Henshaw Road property, for the reason that the trial court in the previous case had limited the United States Attorney to the trial of item (c), and that he was not going to reverse the prior trial court's ruling and further that the appellate court had affirmed the prior trial court's ruling.

CLAUDE E. SPRIGGS

Subscribed and sworn to before me this 6th day of May, 1955.

My commission will expire July 17, 1957.

GLADYSE L. ARMSTRONG
Notary Public

SEAL